83-407

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Lloyd Vickroy

Petitioner,

v.

City of
Springfield,
Missouri

Respondent.

Petition for Writ
of Certiorani from
the U.S. Eighth Circuit
Court of Appeals

PETITION FOR WRIT OF CERTIORANI

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Pro Per
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QUESTIONS PRESENTED

Did the district court err in formulating its opinion on search and seizure rulings, by this Court, prior to the *Brown v. Texas*, 99 S.Ct. 2637(1979), ruling?

Did the district court err in not requiring the burden of proof to be placed upon a Municipal Corporation, where Fourth and Fourteenth Amendment rights are at issue?

Did the district court err in providing sovereign immunity to a Municipal Corporation, where Fourth and Fourteenth Amendment rights were at issue?

Did the appeals court err in its opinion when it ignored facts presented and required supposition and innuendoes to be refuted in the district court?

No.

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OPINIONS BELOW

The opinion and judgment of the U.S. District Court (App. A, pp. A-1 to A-7) is unreported.

The opinion and judgment of the U.S. Court of Appeals, Eighth Circuit is reported in *Vickroy v. City of Springfield, Missouri*, 706 F.2d 853,854(1983); (App. B, infra, pp. B-1 to B-3).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit originally dated May 6, 1983, (rehearing en banc denied on June 1, 1983) affirming the judgment of the United States District Court for the Western District of Missouri, Southern Division dated January 21, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT

1. Background.

The Petitioner was accosted on 28 May 1980, at the bus station at 428 E. St. Louis Street, in the City of Springfield, Missouri, by a police officer, demanding identification. Petitioner informed the officer that he was not entitled to see identification due to a recent supreme court ruling. The officer demanded identification anyway. Petitioner showed the officer his identification. To obtain information and state his complaint, Petitioner wrote a letter to Respondent's Police Department. The response received gave the Petitioner reason to believe his constitutional rights were violated. A claim was made by Petitioner and refused by agents of the Respondent.

Petitioner filed a pro se Title 42 Sec. 1983 complaint in the California Federal Courts, and jursidiction was denied by the Ninth Circuit Court of Appeals. Change of venue was denied by the U.S. District Court for the Western District of Missouri. Petitioner then filed a complaint in the Southern Division of that court.

2. Court Rulings.

The district court has erred in its opinion on search and seizure rulings, by using the rulings by this Court prior to *Brown v. Texas*, supra, indicating that a Municipal Corporation has more rights that any individual and a police officer of that corporation has the right to demand identification from a person under the lesser requirements of administrative probable cause rather than the requirements of criminal probable cause. (App. C, *Chicago Zoological Soc. v. Donovan*, supra.).

The district court erred in not requiring the burden of proof to be placed upon the Respondent, allowing no proof by the Respondent that Vickroy looked like Mordue. The affidavit of Officer Baugh is general in nature and does not meet the

test of sufficiency under common law, (App. C, Booth v. State, 94 P.2d 846,850, 67 Okl. Cr. 413) as the affidavit does not contain the details of the description of Mordue (App. C, *Camara v. Municipal Court*, supra.)

The district court erred in providing sovereign immunity to a Municipal Corporation, as the Missouri State Legislature enacted law to permit the City of Springfield to become a Municipal Corporation, with unsupervised police powers. Use of police powers are acts of the City Legislature. Policy, custom and practice are also permitted and have not been shown to be limited by any act of City legislation. The affidavits of Paul L. Redfearn, Don G. Busch and Gordon Loveland, do not meet the test of sufficiency under common law, (App. C, Booth v. State, supra) as no legislative acts, memos, sections of training manuals, or citations of police procedures were detailed in those affidavits. One act by a misinformed employee could subject all three persons to a perjury hearing under these general affidavits.

The appeals court erred in ignoring fact presented (in Appellant's Brief, App. A) which shows the description broadcast by the Greene County Sheriff's Department, showing the uniqueness of George Thomas Mordue's description. The Petitioner did not possess this uniqueness, nor could defend against that uniqueness, unless it is a required part of evidence presented by the defense, under burden of proof. The record will show that the only description of Mordue presented was in the defendant's exhibit No. 2, Wanted item No. 28542 from the files of the Springfield, Missouri Police Department. (Trial Clerk Record 23). The total description was George Thomas Mordue age 50. In absence of other proof submitted by the defense, this must be the description of record that Officer Baugh used in demanding identification on 28 May 1980.

CONCLUSION

The lower courts are attempting to reduce the criminal probable cause to administrative probable cause.

The lower courts are trying to waive the burden of proof, on a Municipal Corporation, where Fourth and Fourteenth Amendment rights are at issue.

The lower courts are attempting to reduce the test of sufficiency under common law, as to affidavits, to something less than a cause for perjury hearing.

The lower courts are trying to provide sovereign immunity to a Municipal Corporation.

REASONS FOR GRANTING THE WRIT

Together with the reasons listed in the foregoing conclusion, it is normally a function of an officer of the court to investigate and bring charges of perjury against the offenders, unless affidavits do not meet the test of sufficiency under common law, and are moot where used to support the defense.

It is therefore felt that a judicial review is in order, and that more detailed guidelines are needed where action is taken by pro se and the lower courts are reducing the requirements of criminal probable cause.

It is therefore submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION

No. 82-3204-CV-S-4

Lloyd Vickroy, Plaintiff,

v.

City of Springfield, Missouri, Defendant.

Filed January 21, 1983.

Russell G. Clark, Chief Judge.

ORDER.

Defendant City of Springfield has moved for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on the plaintiff's first amended complaint filed pursuant to 42 U.S.C. Sec. 1983 alleges that an agent of defendant City violated plaintiff's constitutional right to privacy by demanding plaintiff's identification thereby causing plaintiff to suffer emotional distress.

On September 13, 1982, plaintiff moved for summary judgment based strictly on the pleadings on file at that time. The Court denied the motion by an order filed October 8, 1982, on the basis that the Court was unable to determine whether there was a genuine issue as to any material fact. In that order the Court set forth the strict standards applicable in ruling a motion for summary judgment and will not repeat them in this order.

Defendant's present motion for summary judgment is on the basis that it is not liable under Title 42 U.S.C. Sec. 1983 on the theory of respondeat superior and that the actions of the City police officer about which plaintiff complaints, as a matter of law, do not rise to the level of constitutional violations. Defendant filed affidavits in support of its motion for summary judgment disclaiming any City policy or practice, the impementation of which would lead to a violation of plain-

tiff's constitutional rights, and setting forth the factual circumstances which led to the officer's detention of plaintiff for identification purposes. The officer's conduct of which plaintiff complains occured in a bus station in Springfield, Missouri. In the affidavit of Officer Bill Bragg, he states that he was familiar with a felonious restraint charge pending against George Thomas Mordue and had received numerous complaints from a witness, Cindy Mordue, regarding intimidation and threats against her by George Thomas Mordue. On the afternoon of May 28, 1980, Officer Bragg was notified of a disturbance at 1531 North O'Hara, the residence of Cindy Mordue. Officer Bragg answered the disturbance call and on arriving was advised that George Mordue had left Cindy Mordue's residence after threatening her with a knife and telling her that he would kill her if she continued to press charges against him. Cindy Mordue gave Officer Bragg a description of George and advised that she believed he was in the process of fleeing from the jurisdiction probably by bus. Officer Bragg called this information in to the Police Department Communication Station and shortly thereafter the dispatcher notified all units by radio that George Mordue was wanted for tampering with a witness on probable cause, set forth his description, and further stated that he might be located in a bar or a bus depot.

The affidavit of Donald L. Sanders, Assistant Prosecuting Attorney for Green County, Missouri, confirmed that under his authority a phone call was made to the Springfield Police Department to arrest Mordue on probable cause on the charge of intimidation of a witness. He further advised the Springfield Police Department that Mordue could possibly be located at one of the bus stations.

Officer John D. Baugh, the officer demanding plaintiff's identification, states in his affidavit that he was on duty patrolling in a police vehicle in the general vicinity of the bus station

where plaintiff was subsequently located. He drove to the Continental Trailways bus depot and observed the plaintiff seated in the waiting area and states that the plaintiff fit the description of Mordue. Officer Baugh went into the bus station, approached plaintiff, and requested plaintiff's identification. After a protest, the plaintiff did produce identification which satisfied Officer Baugh that the plaintiff was not Mr. Mordue. Officer Baugh then advised plaintiff to have a nice trip and left the building. He states that plaintiff remained seated during the entire conversation concerning plaintiff's identification.

On January 20, 1983 plaintiff filed a response to defendant's motion for summary judgment; however, in that response, he does not dispute any of the facts set forth in the affidavits filed by defendant in support of its motion for summary judgment. Defendant filed affidavits by Paul L. Redfern, Mayor of the City of Springfield at the time of the occurrence in question, Don G. Busch, City Manager, and Gordon Loveland, Chief of Police, all disclaiming any policy, custom or practice on the part of the City which would tend to deny the plaintiff any of his constitutional rights.

In plaintiff's opposition to defendant's motion for summary judgment he has not set forth any facts which would support a finding that the City had adopted any policy practice or custom, the implementation of which would lead to a violation of plaintiff's constitutional rights. Nor does he challenge any of the facts set forth in the affidavits as they relate to George Mordue.

> Rule 56, Fed.R.Civ.P., in pertinent part states: When a motion for judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, and his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Note the cases of *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L. Ed.2d 569(1968); *Anderson* v. *Viking Pump Div., Houdaille Industries, Inc.*, 545 F.2d 1127 (8th Cir. 1976); and *Wilmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975).

It is well settled that a municipality may not be held liable on the theory respondeat superior. The case of *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) stated:

On the other hand, the language of Sec. 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under Sec. 1983 on a respondeat superior theory.

Monell, 436 at 691. Then, the Court stated:

We conclude, therefore, that a local government may not be sued under Sec. 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers of by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Sec. 1983.

Monell, 436 at 694. Note also *Owen* v. *City of Independence*, 445 U.S. 622 (1980) and 589 F.2d 335 (8th Cir. 1978).

In plaintiff's complaint he specifically alleges that "an agent (police officer) of the defendant, did . . . demand the identification of plaintiff, thereby violating his right to pri-

vacy." On January 3, 1983, plaintiff filed a proposed "stipulation to uncontroverted facts and intent on the form of Standard Pre-trial Order No. 2." In that stipulation he stated that an agent of the defendant caused a search and seizure of the plaintiff by detaining him and demanding identification thereby violating his right to privacy. It is clear that plaintiff's claim of liability on the part of the defendant City is based upon the acts of the police officer and not upon any policy, practice or custom of the City.

Defendant also maintains that the officer's demand for plaintiff's identification did not violate plaintiff's Fourth Amendment rights as those rights are enforced against the states through the Fourteenth Amendment. The basic purpose of the Fourth Amendment, as recognized in countless decisions of the courts, is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officers. "(T)he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be provable cause or a less stringent test." *Delaware* v. *Prouse*, 440 U.S. 648, 654(1979). In *Linn* v. *Garcia*, 531 F.2d 855 (8th Cir. 1976), it was held that probable for a warrantless arrest exists where facts known to police officers or about which they have reliable information are sufficient in themselves to warrant a person of reasonable prudence and caution in believing that a crime has been or is being committed by the person to be arrested. The Court further held that where the facts are not disputed or are susceptible of only on reasonable inference, the question is one of law for the Court. In *Morrison* v. *United States*, 491 F.2d 344 (8th Cir. 1974) the Court

held that facts constituting reasonable cause to make an arrest are practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act and that there is no constitutional requirement that before an arrest can be made, the officer must conduct a trial. Note the case of *United States* v. *Matthews*, 603 F.2d 48 (8th Cir. 1979). Based upon the information known by Officer Baugh, he could resonably conclude that a crime had been committed, that the perpetrator was attempting to flee and that plaintiff's general appearance was comparable to the description of the perpetrator, Mr. Mordue. There is nothing to indicate that Officer Baugh's approach of plaintiff and his demand for plaintiff's identification were overly obtrusive. Officer Baugh states that plaintiff remained seated at all times. The plaintiff's detention or the invasion of his privacy was brief. Certainly Officer Baugh did not have to positively know the identity of the plaintiff before approaching him and asking for his identification. Where the person believed to have committed a crime is being sought by government officials, his name is known and his general appearance is known, surely it cannot be a violation of a person's Fourth Amendment rights for an officer to demand his identification if his general appearance is comparable to that of the person being sought. The Court is convinced that under the undisputed facts in this case, there was no violation of plaintiff's Fourth Amendment rights by Officer Baugh, but even assuming that Officer Baugh's conduct was a violation of his Fourth Amendment rights, such conduct is not imputable to the defendant City. Therefore, it is hereby ORDERED that defendant City of Springfield's motion for summary judgment is granted and the Clerk is directed to enter

judgment in favor of defendant and against plaintiff Lloyd Vickroy, with cost to be assessed against plaintiff.

RUSSELL G. CLARK,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

DATED: January 21, 1983

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 83-1200
Lloyd Vickroy, Appellant,
v.
City of Springfield, Missouri, Appellee.
Appeal from the United States District
Court for the Western District of Missouri.
Submitted: May 3, 1983.
Filed: May 6, 1983.
Before LAY, Chief Judge, Ross and McMillian, Circuit Judges.

PER CURIAM.

Plaintiff-appellant Lloyd Vickroy sued the City of Springfield, Missouri, under 42 U.S.C. Sec. 1983 for violating his Fourth Amendment rights and his right to privacy. His claim arises from a detention by a Springfield police officer. The district court granted[1] the city's motion for summary judgement.

The following facts were established by affidavits and uncontradicted by Vickroy.

On May 28, 1980, Officer Bill Bragg answered a disturbance call at 1531 N. O'Hara, the residence of Cindy Mordue. Bragg was familiar with a felonious restraint charge pending against George Mordue, Cindy's husband. When Bragg arrived at the Mordue residence, Cindy reported that George had been there and threatened to kill her if she continued to press charges. Cindy gave Bragg a description of George and stated that she believed he was fleeing the jurisdiction by bus.

Bragg called an assistant prosecuting attorney, Donald Sanders, who was familiar with the Mordue case. Sanders believed there was probable case to arrest Mordue for tam-

pering with a witness and authorized an arrest. Bragg called the Police Department, and all units were notified that George Mordue was wanted for tampering with a witness, given a description, and informed that he might be at the bus station.

Officer Baugh heard the dispatch and went to the bus station. He saw Vickroy in the waiting area and stated that Vickroy fit the description of Mordue. Baugh asked Vickroy for identification, when Vickroy refused, Baugh stated that he would be arrested. Vickroy then produced identification, and Baugh thanked him and left.

The district court, on the City's motion for summary judgment, found no constitutional violation and granted the motion.

Officer Baugh's threat to arrest Vickroy if he did not identify himself constituted a seizure subject to the requirements of the Fourth Amendment. *Brown v. Texas*, 443 U.S. 47,50 (1979). The Fourth Amendment requires that a seizure be "reasonable;" when the seizure is "less intrusive than a traditional arrest," reasonableness depends on a balance between public interest and the individual's right to personal security free from arbitrary interference by law officers. *Id.* at 50; *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

In this case Officer Baugh's detention of Vickroy seems imminently reasonable. He had probable cause to arrest Mordue, and Vickroy never did argue before the district court that he did not fit the description of Mordue. The police officer's action cannot be characterized as an "arbitrary" request for identification.

Because we see no constitutional violation, we affirm the judgment of the district court on the basis of its well-reasoned opinion. *See* 8th Cir. R. 14.

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The Court, having considered appelant's petition for rehearing and suggestions for rehearing en banc and being now

fully advised in the premised, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 1, 1983

1. The Honorable Russell G. Clark, Chief Judge, United States District Court for the Western District of Missouri

APPENDIX C

Chicago Zoological Soc. v. Donovan, 558 F. Supp. 1147.
Requirements of administrative probable cause are less stringent than requirements of criminal probable cause.

Booth v. State, 94 P.2d 846,850, 67 Okl. Cir. 413.
The test of the sufficiency of an affidavit is whether it has been drawn in such a manner that it might be the basis of a charge of perjury, if any material allegation contained therein is false, and paper purporting to be affidavit on which perjury could not be assigned if it were false, is not an "affidavit."

Camara v. Municipal Court, 387 U.S. 523 (1976) at 528.
" . . . but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons . . . to be seized."

No. 83-407

In the Supreme Court of the United States

October Term, 1983

LLOYD VICKROY,
Petitioner,

vs.

CITY OF SPRINGFIELD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE U.S. EIGHTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Petition for Writ of Certiorari untimely, and therefore unreviewable by this Court?
2. Did the district and appellate courts err in holding that the City of Springfield, a municipal corporation, could not be held liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior?
3. Did the district and appellate courts err in holding that the actions of a City of Springfield police officer did not rise to a constitutional violation under the Fourth and Fourteenth Amendments?
4. Do the issues in this case present special and important questions sufficient to warrant the issuance of a writ of certiorari?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On the afternoon of May 28, 1980, Springfield Police Officer Bill Bragg was notified of a disturbance at 1531 North O'Hara, Springfield, Missouri, the residence of Ms. Cindy Mordue. Upon his arrival at the residence, Officer Bragg was informed by Ms. Mordue that one George

Thomas Mordue had just left her residence after threatening her with a knife and telling her he would kill her if she continued to press charges against him. Ms. Mordue had previously filed felonious restraint charges against Mr. Mordue. Ms. Mordue gave Officer Bragg Mordue's description and told him she thought he was heading for the bus station.

Officer Bragg related these facts to Donald L. Sanders, Assistant Prosecuting Attorney for Greene County, Missouri, who issued a directive to the Police Department that George Mordue be arrested on probable cause under the charge of intimidating a witness. In the meantime, the police dispatcher broadcast Mordue's description, that he was wanted for intimidating a witness, that he could be dangerous, and that he might be located at the local bus station.

Officer John D. Baugh was on routine patrol in the vicinity of the bus station and heard the radio dispatch. He noticed the Petitioner seated in the bus station, determined that he fit the description of Mordue, and approached the Petitioner and requested identification. Petitioner at first protested, but then produced identification which satisfied Officer Baugh that Petitioner was not Mr. Mordue. The officer then left the building.

Petitioner, acting pro se, first brought this action pursuant to 42 U.S.C. Sec. 1983 in the U.S. District Court for the State of California. The case was dismissed for lack of jurisdiction over the defendant, City of Springfield, and for failure to state a cause of action. The Ninth Circuit Court of Appeals affirmed the dismissal on the question of jurisdiction and ruled it was unnecessary to reach the issue of whether the complaint stated a cause of action.

Petitioner then refiled his action in U.S. District Court, Western District of Missouri, Southern Division. The City of Springfield, the only defendant in the cause, moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P. based upon the pleadings and affidavits attached to the motion. The U.S. District Court granted the motion on the grounds that the defendant, City of Springfield, was not liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior and that the actions of the City police officer did not rise to the level of a constitutional violation. The Eighth Circuit Court of Appeals affirmed the judgment of the district court.

SUMMARY OF ARGUMENT

A. 28 U.S.C. Sec. 2101(c) establishes time limits for petitions for writs of certiorari. The rule states that a writ of certiorari shall be applied for within ninety days after the entry of a judgment or decree. The Eighth Circuit Court of Appeals entered its judgment in this cause May 6, 1983. Petitioner did not file his petition until on or about September 1, 1983. The Petition is therefore jurisdictionally out of time and may be refused by the Clerk of this Court. (Rule 20.3 Supreme Court Rules) Petitioner's motion to extend time should be denied because he has not established good cause for the extension.

B. The district court did not err in holding that the City of Springfield, a municipal corporation, was not liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior. A municipality may not be held responsible for the constitutional torts of its officers or employees under the theory of respondeat superior. The district court correctly concluded that the Petitioner failed to carry the

burden of proof as to whether the City of Springfield pursued a policy or custom of discrimination which would result in the imposition of liability under 42 U.S.C. Sec. 1983.

C. The district court did not err in holding that the actions of the police officer did not, as a matter of law, rise to a constitutional violation under the Fourth and Fourteenth Amendments.

Officer Baugh had probable cause to question Petitioner regarding his identity, and to tell Petitioner that if he refused to identify himself he would be subject to arrest. Although Officer Baugh's threat to arrest Petitioner if he refused to identify himself may have constituted a seizure under the Fourth Amendment, it was a reasonable, not an arbitrary seizure, and was not in violation of Petitioner's constitutional rights.

D. None of the considerations articulated by this Court in Rule 17, Supreme Court Rules, indicating the types of cases which the Court considers reviewable on a petition for certiorari, are present in this case. The holdings of the district court and Court of Appeals are not in conflict with other court decisions. Federal questions decided in this case are harmonious with federal questions decided by other courts. This case does not present such novel federal questions that this Court need issue a final definitive opinion. Nor are the holdings of the lower courts in conflict with the applicable decisions of this Court. This Court should deny the petition for writ of certiorari.

ARGUMENT

A. The Petition for Writ of Certiorari Is Untimely According to 28 U.S.C. Sec. 2101(c) and Should Therefore Be Denied.

28 U.S.C. Sec. 2101(c) establishes the time limits for the presentation of petitions for writs of certiorari to this Court. The rule states:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment of decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The Eighth Circuit Court of Appeals entered its judgment in this cause May 6, 1983. The 90-day time limit for Petitioner to file a petition for writ of certiorari expired on August 4, 1983. Petitioner filed his petition for writ of certiorari September 1, 1983, a full four weeks after the deadline for the submission of the petition according to Sec. 2101(c).

Nineteen days after it received the petition for writ of certiorari, Respondent received Petitioner's motion to extend time to file petition for certiorari. Petitioner has not presented any facts which would establish good cause for the delay. Delays in printing and layout are foreseeable events which could easily have been avoided by the Petitioner. The fact that four attorneys refused to assist Petitioner detracts from, rather than supports Petitioner's

argument for good cause. These attorneys saw no valid claim and declined to represent him. Petitioner had nearly three months to prepare his writ. This amount of time was adequate, especially in light of the brevity of his petition. Petitioner's motion to extend time should be denied.

B. The City of Springfield, Missouri, a Municipal Corporation, Cannot Be Liable Under 42 U.S.C. Sec. 1983 on the Theory of Respondeat Superior.

In his petition for writ of certiorari, Petitioner claims that the District Court erred in providing sovereign immunity to the City of Springfield, a municipal corporation. (Petition for Writ of Certiorari, p. 3) Contrary to Petitioner's allegation, the District Court did not hold that the City of Springfield was exempt from suit under a sovereign immunity theory. Instead, the court held that the City of Springfield could not be held liable under 42 U.S.C. Sec. 1983 on the theory of respondeat superior.

Since this Court decided *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), it has been uniformly clear that a municipality may not be held liable on the theory of respondeat superior for the constitutional torts of its employees. In order to impose liability on a municipality under *Monell*, a civil rights plaintiff must show his injury resulted from a discriminatory policy or custom pursued by the municipality.

> "We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." (*Id.* at 694)

In the instant case, Petitioner's initial complaint merely alleged, "An agent of the defendant did . . . demand the identification of plaintiff, thereby violating his right to privacy." (Appeal, Exhibit 11, p. 1) Petitioner did not allege that the officer's actions were taken pursuant to any unconstitutional policy or custom of the City of Springfield. Even had Petitioner alleged an unconstitutional policy in his complaint, the City amply demonstrated that such a policy was not in effect. As part of its motion for summary judgment the City filed a number of affidavits from its Mayor, its City Manager, and its Chief of Police, all disclaiming any policy, custom or practice on the part of the City which would tend to deny Petitioner his constitutional rights. (Defendant's Motion for Summary Judgment, Appeal, Exhibit 27)

Petitioner did not introduce any evidence of an affirmative link between the policies of the City of Springfield and the acts of its police officer which resulted in the denial of his constitutional rights. *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982) (No *Monell* claim because defendants were not directly involved with police misconduct.) Petitioner did not allege that the City of Springfield had knowledge of a pattern of unconstitutional acts by its police department but failed to take steps to remedy those patterns. *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir. 1980) (Municipality may be held liable if its inaction amounts to deliberate indifference to or tacit authorization of unconstitutional acts by its police officers.)

Petitioner has only argued that, "Use of police powers are acts of the City Legislature. Policy, custom, and practice are also permitted and have not been shown to be limited by any act of City legislation." (Petition for Certiorari, p. 4) A mere allegation that a municipality may exercise policy, custom, and practice is wholly insufficient

to support a claim alleging violating of one's constitutional rights.

C. The Actions of the City Police Officer Do Not, As a Matter of Law, Rise to the Level of a Constitutional Violation.

The Eighth Circuit Court of Appeals found that Officer Baugh's brief detention of Petitioner fell within the reasonableness requirement of the Fourth Amendment. The Court concluded that even though Officer Baugh's threat to arrest Petitioner if he did not identify himself constituted a seizure, under the circumstances, that seizure was imminently reasonable. (Petition for Certiorari, Appendix B) The City's affidavits reveal that Officer Baugh was acting in accordance with instructions received from the Greene County Prosecutor. Probable cause existed to believe that George Thomas Mordue had committed the felony of tampering with a witness, that he was believed to be fleeing the jurisdiction and might be located at the bus station. (Sanders affidavit)

Baugh arrived at the bus station, observed the Petitioner, and concluded that he fit the description of Mordue. (Baugh affidavit) Baugh requested identification of the Petitioner, Petitioner refused. Baugh then informed him that on the basis of the radio description, he believed there was probable cause to arrest him on reasonable belief that he was Mordue until his identification could be verified. When the Petitioner produced identification indicating he was not Mordue, the officer thanked him and left. (Baugh affidavit)

Petitioner relies upon *Brown v. Texas*, 443 U.S. 47 (1979) as authority for his contention that a municipal corporation does not have the right, "to demand identification

from a person under the lesser requirements of administrative probable cause rather than the requirements of criminal probable cause." (Petition for Writ of Certiorari, p. 3) Petitioner misreads *Brown's* holding. *Brown* involved a situation in which police officers, acting without probable cause, arrested a detainee after he refused to identify himself. The man was later convicted under a Texas statute making it a crime to refuse to identify oneself to a police officer.

In the instant case, the district court and the Court of Appeals found that Officer Baugh was acting with sufficient probable cause to request identification from the Petitioner. The District Court in its order stated,

> "Where the person believed to have committed a crime is being sought by government officials, his name is known and his general appearance is known, surely it cannot be a violation of a person's Fourth Amendment rights for an officer to demand identification if his general appearance is that of the person being sought."

Furthermore, Petitioner's detention in this case falls within the permissible limits of invasions of privacy enunciated by this Court in *Brown* (*supra*), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). That is, to test the constitutionality of seizures such as the one in the instant case, the courts must weigh the gravity of public concerns served by the seizure, and the degree to which the seizure advances the public interest, against the severity of the interference with personal liberty. In Petitioner's case, the public concern underlying the seizure was substantial. A felon was attempting to flee the jurisdiction. He previously threatened his ex-wife with a knife, and told her he would kill her if she pursued the charges against him.

On the other hand, the invasion of Petitioner's privacy was slight. The District Court noted that there was nothing overly obtrusive about Officer Baugh's request for identification from the Petitioner. Officer Baugh stated that the Petitioner remained seated during their conversation. When Petitioner produced identification, the officer thanked him and left. The entire length of the conversation could not have lasted more than a few minutes. Officer Baugh's action was not arbitrary, instead it rested upon specific objective facts, indicating that society's legitimate interests required the seizure of the person thought to be George Mordue. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Under these circumstances, it cannot be said that the brief detention of Petitioner for questioning was a violation of his Fourth and Fourteenth Amendment rights.

D. The Writ of Certiorari Should Be Denied Since the Issues Presented Herein Are Not of a Sufficient Character to Warrant This Court's Intervention.

This Court has delineated the class of questions it considers proper for review by writ of certiorari. (Rule 17, Supreme Court Rules) While these categories are not controlling in determining whether this Court will hear a case, they do provide guidance for those litigants seeking an avenue of review. None of the enumerated considerations set out in Rule 17 are present in the instant case. The holdings of the District Court and Court of Appeals are in accord with those of other courts that have addressed the same issues. (See, re: reasonableness of detention; *United States v. Leyba*, 627 F.2d 1059, cert. den. 101 S.Ct. 406, 449 U.S. 987, 66 L.Ed.2d 250 (1980); *United States v. Magda*, 547 F.2d 756, cert. den. 98 S.Ct. 230, 434 U.S. 878, 54 L.Ed.2d 157 (1976). See also, re: no municipal

liability under respondeat superior; *Turpin; Tarpley; supra*). The Eighth Circuit Court of Appeals' decision complies rather than conflicts with the decisions of this Court. (See *Brown, Prouse, supra*). No novel issues concerning interpretation of federal law are set forth in this case which would require their ultimate resolution by this Court.

The instant case is an example of precisely the type of case this Court intended to refrain from reviewing when it drafted Rule 17.

CONCLUSION

The District and Appellate Courts held under the undisputed facts that there was no violation of Petitioner's Fourth and Fourteenth Amendment rights. Officer Baugh was not required to know the identity of the Petitioner before approaching him and asking for identification. As the District Court emphasized, it cannot be a violation of a person's Fourth Amendment rights for an officer to demand identification if his general appearance is comparable to that of the person being sought.

Petitioner has failed to set forth evidence of a policy, practice or custom on the part of the City of Springfield, which would result in it being liable under 42 U.S.C. Sec. 1983. Instead, Petitioner has attempted to hold the City liable under the theory of respondeat superior.

The Petitioner also failed to allege that there are special and important reasons present in his case which would compel this Court to issue a writ of certiorari.

Furthermore, Petitioner's application for writ of certiorari is untimely and he has not shown that good cause

existed for the delay. For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL AS TO SERVICE

Three copies of the foregoing document were served upon the party whose name is set forth below, by depositing same in the mail, on this 29th day of September, 1983.

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HOWARD C. WRIGHT
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